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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 183

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
APPELLANT,

Versus

FRANK W. WEBSTER (Substituted for R. H. Baker) ET AL.,
APPELLEES.

BRIEF ON BEHALF OF APPELLANT, THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

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Counsel for appellant.

November 21, 1934.

INDEX.

	Pages
Preliminary statement	1-4
Constitutional questions involved	4-5
Jurisdiction	5
Statement of the case	6-23
Bill of complaint as amended	6-9
Answer	9-10
Findings and decision of the trial court	11-12
Proceedings in the Supreme Court of Tennessee	12-13
The facts	13-23
Specification of errors	24-26
Due to the revolution in transportation, including the wholly changed grade crossing situation, a state may no longer impose upon a railroad directly the cost of grade separation projects on state and federal aid roads, deliberately planned to foster interstate commerce by motor vehicle in competition with railroads.	24-26
Argument	27-63
Summary of argument	29-30
I. A statute may be reasonable and, therefore, valid at one time or under one set of circumstances, yet unreasonable and, therefore, invalid under different circumstances. A statute may be perfectly valid on its face, yet under a given state of facts, disclosed by evidence, be invalid. While the fundamental principles of the organic law of the Nation remain unchanged, their application to changing conditions must and does call for a restatement of ancient and obsolete rules.	31-33
II. Constructing highways and making them safe for non-existent but anticipated fast, heavy, commercial traffic, in direct competition with railroads, is not an exercise of the police power	33-36

PAGES

III. The government of the United States, under the commerce and post roads provisions of the Federal Constitution, may build and construct post roads, but it has no police power and the mere fact that it builds or has built, such roads safely does not change the nature of the power exercised 36-37

IV. Any valid exercise of the police power requires investigation and knowledge of factors involving safety, as distinguished from mere traffic considerations 37-38

V. The difference between the engineering and traffic considerations for making a highway safe and convenient for commercial business thereon and a legitimate exercise of the police power has been recognized in several recent cases 38-42

VI. This Court and state courts have, in the past, frequently held that a railroad could be required to separate a grade crossing at its sole expense. Such cases are no longer controlling where the evidence shows that conditions have entirely changed and that commercial convenience of motor traffic rather than public safety is the motivating and controlling influence of action 42-43

VII. Assuming that the construction of the underpass here involved be the result of an exercise of the police power, even so, such exercise is subject to the due process of law clause of the Fourteenth Amendment to the Federal Constitution 43-45

VIII. Further, a state may not, even in the intelligent and reasonable exercise of the police power, burden interstate commerce..... 45-47

IX. Where a new right of way of a commercial transportation company, whether railroad or highway, crosses the right of way of an existing commercial road the new one must pay the crossing cost 47-48

X. The Interstate Commerce Commission in a series of elaborate investigations recently held has officially recognized that which is of common knowledge, namely, that commercial transportation by motor vehicle, enormous in proportions, is in active and successful competition with the railroads..... 49-54

PAGES

XI. This Court, taking judicial knowledge of the growth of commercial transportation by motor vehicle, has recognized the necessity and legality of state action designed in part to protect interstate commerce by railroad from destruction by unregulated, competing, commercial motor transportation..... 55

XII. A general system of discrimination against a citizen may be attacked at any of its component parts. Interstate commerce by railroad is being discriminated against, as well as burdened and crippled, in taxation, regulation, and state requirements placing the cost of all grade crossing protection and separation on railroads alone 56-58

XIII. The interpretation of the Federal Constitution is not static. It varies with the times to meet new and altered conditions..... 58-59

XIV. The revolution in transportation and the incidental grade crossing problem necessitates a restatement of the ancient and obsolete rules of law with reference thereto..... 59-63

TABLE OF CASES CITED.

PAGE

Abie State Bank v. *Bryan*, 282 U. S., 765, 766 33

Baker et al. v. *N., C. & St. L. Ry.*, 167 Tenn., 470, 71 S. W. (2d), 678 ..... 3, 12
Bradley v. *Public Utilities Com.*, 289 U. S., 92 55

Campbell v. *McIntyre*, 165 Tenn., 47, 52-53 45
Chattanooga v. *Southern Ry.*, 128 Tenn., 398 42
Chicago & N. W. Ry. v. *Railroad Commission*, 205 Wis., 506, 238 N. W., 365, 366 38
Chicago, St. P. M. & O. Ry. v. *Holmberg*, 282 U. S., 162. 40-42
Cincinnati v. *L. & N. R. R.*, 223 U. S., 390, 404 35
Cohens v. *Virginia*, 6 Wheaton 264, 399 43
Collier v. *Baker*, 160 Tenn., 571, 574-575 38
Colorado v. *United States*, 271 U. S., 153, 163 47
Commonwealth v. *Alger*, 7 Cushing, 53, 84 35
Continental Baking Co. v. *Woodring*, 286 U. S., 352 55
Cooley on Constitutional Limitations, 7th ed., p. 830 ...35, 37
Coordination of Motor Transportation, 182 I. C. C., 263 ..50-52
Coyne v. *Memphis*, 118 Tenn., 651, 663 35

Docket 26000, 195 I. C. C., 5 .....27, 43, 53-54, 59
Dyer County v. *Railroad*, 87 Tenn., 712, 714 48

Elliott on Roads and Streets, 4th ed., secs. 204, 465 35
Erie Railroad v. *Board of Public Utility Commissioners*, 254 U. S., 394, 412 .....42, 43, 59
Ex Parte 103, 178 I. C. C., 539, 583 49

Fertilizing Company v. *Hyde Park*, 97 U. S., 659, 667 37
Finance Docket 7038, 150 I. C. C., 539, 541 53
Finance Docket 8989, 180 I. C. C., 65, 67 52-53
First National Bank v. *Littlefield*, 266 U. S., 110, 112 12
Florida v. *United States*, 292 U. S., 1, 12 46
Franklin & Columbia Turnpike Co. v. *County Court*, 27 Tenn., 342 35
Frost v. *Corporation Com.*, 278 U. S., 241, 246 56
Fryar v. *Hamilton County*, 160 Tenn., 216, 219 35
Funk v. *United States*, 290 U. S., 371, 382, 383, 385 31

Galveston Electric Co. v. *Galveston*, 258 U. S., 388, 400 ... 33
Gregg Dyeing Co. v. *Query*, 286 U. S., 472 56

Harriman v. *Railroad*, 111 Tenn., 538 42
Hart Coal Company v. *Sparks*, 7 Fed. Sup., 16, 19 .....37, 55

PAGE

Hicklin v. *Coney*, 290 U. S., 169 55
Home Building & Loan Association v. *Blaisdell*, 290 U. S., 398, 437 33
Hopkins v. *Southern California Tel. Co.*, 275 U. S., 393, 403 57
Hutsell v. *Citizens National Bank*, 166 Tenn., 598, 611 9

In Re: Elimination of Grade Crossings over Tracks of B. & O. R. R., 124 Ohio St., 406, 179 N. E., 139 39
Interstate Busses Corp. v. *Blodgett*, 276 U. S., 245, 251 ... 57

Lawton v. *Steele*, 152 U. S., 133, 136 34
Lehigh Valley R. R. v. *Board of Public Utility Commissioners*, 278 U. S., 24 ..... 42, 43, 59
Lewis on Eminent Domain, 3d ed., sec. 6, pp. 13-16 35
Lochner v. *New York*, 198 U. S., 45, 56 44
Louisville Gas & Electric Co. v. *Coleman*, 277 U. S., 37-40 .. 57

McNeill v. *Southern Ry. Co.*, 202 U. S., 543, 561 47
Memphis & Charleston Ry. v. *Pace*, 282 U. S., 241, 246 56
Missouri v. *Kansas Natural Gas Co.*, 265 U. S., 298, 306 ... 47
Motlow v. *State*, 125 Tenn., 547, 589 ..... 34, 45

Nashville, Chattanooga & St. L. Ry. v. *Baker, et al.*, 167 Tenn., 470, 71 S. W. (2d), 678 ..... 3, 12
Nebbia v. *New York*, 291 U. S., 502, 525 32
Northern Pacific v. *Duluth*, 208 U. S., 583, 597 42

Ohio Oil Co. v. *Conway*, 281 U. S., 146, 160 56

Pennsylvania Coal Co. v. *Mahon*, 260 U. S., 393, 413 44
Pope v. *Phifer*, 50 Tenn., 682, 700 ..... 62, 63

Railroad v. *Husen*, 95 U. S., 465, 472 46
Road Improvement District v. *Missouri Pacific*, 247 U. S., 188, 194 55
Ruling Case Law, Vol. 6, sec. 190 37

Sanitary District of Chicago v. *United States*, 266 U. S., 405, 426 46
St. Louis & S. F. R. R. v. *Public Service Commission*, 254 U. S., 535 47
Scopes v. *State of Tenn.*, 154 Tenn., 105, 111, 112 35
Seaboard Air Line Ry. v. *Blackwell*, 244 U. S., 310 33
Sidney v. *Wabash Ry.*, 333 Ill., 26, 164 N. E., 201, 203 39
Southern Ry. v. *Simpson*, 149 Tenn., 458, 462 ..... 60, 61
Southern Ry. v. *State*, 130 Tenn., 261, 264 38
Southern Ry. v. *Virginia*, 290 U. S., 190, 195 ... 34, 38, 44, 56
Snyder v. *Massachusetts*, 291 U. S., 97, 115-116, 117 31
Sproles v. *Binford*, 286 U. S., 374, 394 55
State, ex rel. v. *Cummings*, 130 Tenn., 566, 572 35

PAGE

State Highway Department v. *Mitchell's Heirs*, 142 Tenn., 58, 66, 72, 74 ..... 35, 37
Stephenson v. *Binford*, 287 U. S., 251, 276 ..... 34, 55

Transit Commission of New York v. *United States*, 284 U. S., 360 40
Travelers' Protection Assn. v. *Prinsen*, 291 U. S., 576 29
Truax v. *Corrigan*, 257 U. S., 312, 331-334, 337-339 57

United Railways v. *West*, 280 U. S., 234, 249 33
United States v. *Boston Elevated Ry. Co.*, 176 Fed., 963 ... 35
United States v. *DeWitt*, 9 Wallace, 41, 45 37

Village of Euclid v. *Ambler Realty Co.*, 272 U. S., 365, 387 . 32

Yick Wo v. *Hopkins*, 118 U. S., 356, 373-4 63

Statutes Referred To.

Tennessee Public Acts:
Chapter 132 Public Acts, 1921 (1932 Code 2638 et seq.) 2, 3, 20
Chapter 82 Public Acts, 1931, section 3 7
Chapters 35, 97, 114, 119 Public Acts, 1933 58
Constitution of the United States:
Fourteenth Amendment 9, 24, 25, 26, 30, 43, 54
Commerce Clause 9, 25, 26, 30, 45, 47
United States Code, Annotated:
Title 23, sections 2 and 6 36
Title 39, chapter 14 36

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BRIEF ON BEHALF OF APPELLANT, THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

MAY IT PLEASE THE COURT:

The federal government, by appropriate statutes and administrative action, is directing and helping finance the construction of a nation-wide system of super-roads in the interest of commerce by motor ve-

hicle. One of these projects involved a new road, east and west across Tennessee, in addition to three existing routes, running roughly from Nashville, via Centreville, Linden, Lexington, and Jackson to Memphis. (R., 13, 353-356; Exhibit Sup., 19.)

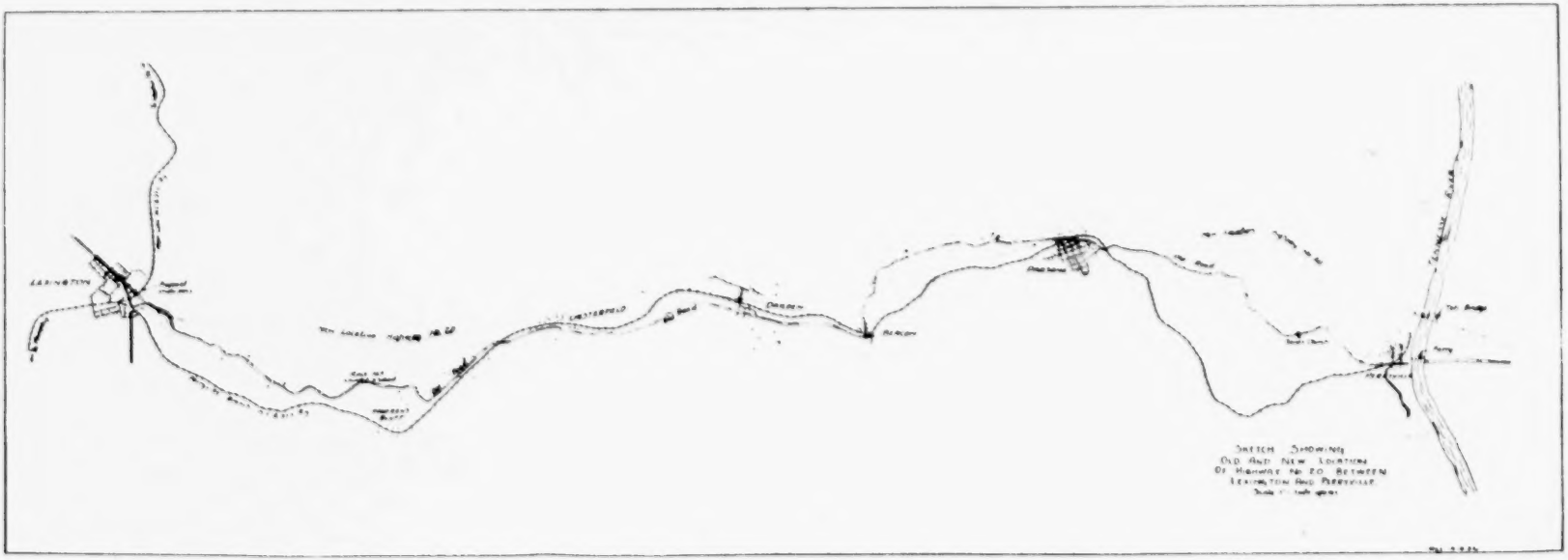
One of the links of this new federal and state aid road lay between Perryville, on the Tennessee River, and Lexington on the lines of appellant. These towns had long been connected by a public road known as (old) Route 20. While the old Route 20 will be continued to meet needs of local travel, a new Route 20 has been built between the same termini,* with little or no thought of serving the local communities, but for the convenience of through commercial transportation by motor vehicle. On the opposite page is a reproduction of Exhibit No. 1 to the testimony of W. K. Tate (Ex. Sup., 179), reduced in size. The blue line represents old Route 20 and the red line new Route 20. Both continue in existence, the former to serve local communities and local needs, the latter to serve, largely, interstate commerce by motor vehicle.

This new Route 20, as projected, crossed the main line of appellant within the corporate limits of the little town of Lexington at a point where there had never been a public road. Nor for local travel was one needed. (R., 13-14; Ex. Sup., 21-45.)

The federal government refused to grant federal aid to this project unless the Railway's tracks at this point were crossed by an underpass, so the Tennessee authorities relying on Chapter 132 of the 1921 Public

*Except that this portion of the new Route 20, for engineering reasons, originates some distance from and not at or in Perryville. (R., 176, 187.)

Exhibit No. 1 to Testimony of W. K. Tate. (R., Exhibit Supp., 179)



Legend (Not on Original)
Red—New Route 20
Blue—Old Route 20

(Reduced in size)

Acts of Tennessee, as amended (1932 Code of Tennessee, sections 2638, *et seq.*) (Ex. Sup., 11-18), ordered appellant Railway to separate this grade in accordance with plans approved by the federal government and to pay directly one-half the cost of the grade separation project. (R., 9.) No bus or truck company was ordered to contribute.

The Railway, being advised that it was under no obligation to comply with said order, filed a bill in the Chancery Court at Nashville, challenging the validity of the order and the validity of the statutes on which it was based, under the Constitution of the United States, on a statement of facts which are set forth in the bill of complaint.

Answer was filed and proof taken. The trial court, with one immaterial exception, found that the testimony fully supported every averment of fact in the bill, held the challenged statutes to be unconstitutional, the order based thereon to be void, and made an appropriate order consistent with the findings of fact. (R., 414-418.)

The state officials, appellees here, respondents in the trial court, appealed to the Supreme Court of Tennessee. (R., 417.)

No challenge was there made by either party to the findings of fact of the trial court (R., 418) and by stipulation in this Court practically all of the averments of fact in the bill of complaint are admitted. (R., 1-7; Ex. Sup., 3-8.)

The Supreme Court of Tennessee (167 Tenn., 470, 71 S. W. (2d), 678) accepted the findings of fact as made by the trial court, but held that, as the proposed

underpass was an exercise of the police power, the order of the Highway Commissioner was valid, and that the Tennessee statutes on which it was based were constitutional, assuming, first, that the police power of the state was subject to no limitation and, second, that a statute, valid when enacted, continues to be valid regardless of changed conditions. (R., 419-429.)

The Railway has appealed to this Court, relying on the same federal constitutional questions presented to the Tennessee courts.

The only questions here relate to appellant's challenge to the validity of the order of the Commissioner of Highways of Tennessee, and the statutes on which it is based, under the provisions of the Constitution of the United States. The following questions, briefly, are the ones for decision:

Constitutional questions involved.

1. Have conditions so changed in relation to financing grade crossing separations on such state and federal highways, as here involved, as to render obsolete rules of law originating and crystallized in "horse and buggy" days, under the modern requirements of the "motor age"?

2. Under conditions obtaining in the case at bar, when a super-highway is being constructed as a part of a nation-wide route for interstate commerce by motor vehicle, not to serve, primarily, local needs or traffic, but to foster the business of interstate commerce by motor vehicle, can one citizen, a railroad, alone, be required to pay, directly, half the cost of a grade separation project, dictated by the Federal Bureau of Public Roads at Washington without knowl-

edge or thought of local traffic conditions, designed exclusively for the convenience of commerce by motor vehicle in active and effective competition with transportation by railroad?

3. When conditions have so vitally changed that *trains need protection against motorists* (most of the traffic on such highways being by motor vehicle) rather than motorists against trains, can a state, in obedience to the direction of the federal government, order the separation of a grade crossing for the commercial convenience of the competitors of the railroads and impose, directly, one-half the cost of such project on appellant Railway and no part on appellant's competitors for which the project was designed?

4. Can interstate commerce by railroad be seriously burdened by state action for the exclusive benefit of its successful competitor doing a commercial transportation business on the public highways?

5. Is the building of a federal and state highway, as part of a nation-wide system of through public roads, including the various incidents thereto, such as the underpass in question, for commercial transportation by motor vehicle to take care of non-existing, but anticipated, interstate traffic, as distinguished from local needs, an exercise of the police power; and, if so, can the only citizen which will be injured thereby, namely, appellant Railway, be required, alone, to make a direct contribution thereto?

JURISDICTION.

Appellant Railway on June 28, 1934, filed its separate statement and brief on jurisdiction in conformity with Rule 12 of this Court.

STATEMENT OF THE CASE.

Bill of complaint as amended.

The original bill, with its several exhibits, set out in great detail the facts on which appellant Railway relied in its challenge to the validity of the order and state statutes in question. It was amended merely to take care of changing official personnel amongst the respondents below, appellees here, and to correct two minor errors in the original bill. (R., 32-33.)

As the trial court found that the testimony fully sustained every material averment of fact in the original bill of complaint as amended (R., 416); as that finding was not challenged in the Supreme Court of Tennessee (R., 418); as that court accepted the findings of fact made by the trial court; and as, by stipulation filed in this Court (R., 1-7; Ex. Sup., 3-8), most of the averments in said original bill are admitted to be true, we will make here a very brief statement of the averments of the bill; and this now follows.

A new east and west super-highway sponsored by the federal and state governments was projected from Nashville to Memphis via Centreville and Lexington, Tennessee. There had long been a road (old Route 20) between the Tennessee River, at Perryville, and Lexington, which served all the little communities between those points. In order to take care of anticipated heavy, fast, through traffic, with little or no thought of local communities or local traffic, a new road—part of the new through route—not in substitution but in addition to the old road, was built from a point on the Tennessee River *some distance from* Perryville to Lexington.

This road is known as (new) Route 20 and is a federal and state aid road. (R., 11-14.)

The old road, above referred to, had entered Lexington via a city street named Clifton and crossed the main line of the Railway at grade. (R., 13.)

This crossing is open, level and protected by the most modern electrical devices at the sole expense of the Railway. Few trains operate over this crossing. There has never been a serious accident. There has never been any suggestion that this grade be separated and the Highway Department of the State has never designated it as a dangerous one under Section 3 of Chapter 82 of the 1931 Public Acts of Tennessee. (R., 13-15; 17.)

The new super-road, built on substantially a beeline, from the Tennessee River to Lexington struck the main line of the Railway some 1,000 feet east of the Clifton Street crossing and the federal government made it a condition of federal aid that the crossing be by the medium of an underpass. (R., 13-14.)

The location of this newly projected road and crossing does not serve the local needs of Lexington nor was it so intended, but was designed, at the dictate of federal authorities, in the interest of through commerce by motor vehicle, primarily interstate. (R., 23, 25, 28, 30.)

Not a single grade crossing is being eliminated by this project and its design and location was dictated for the convenience of excessively large fast-moving motor vehicles. The benefit to be derived from this project will be almost exclusively in favor of through interstate commerce by motor vehicle in direct com-

petition with appellant Railway. Not a road user or a beneficiary or a citizen, except appellant Railway, was ordered to participate directly in the cost of the project. (R., 11.)

The bill in detail showed the revolution in transportation, commerce and, indeed, the very life of the people, due to the advent of automobiles and the construction of a connected system of public highway, national in scope. (R., 13-22.) Changed conditions at grade crossings were fully described. (R., 23-25.) The discrimination in treatment, in taxation, regulation and otherwise, against railroads in favor of their competitors on the highways was set forth in infinite detail. (R., 17, 25-27, 30.)

With all of this as a predicate the Railway challenged the validity of the order and the Tennessee statutes, so far as is now material, on the following grounds, generally:

1. That the construction of the underpass in question was not an exercise of the police power but was merely an incident in the building of a super-highway system for the convenience of commerce by motor vehicle, so that to undertake to impose upon the Railway alone—the only citizen who would be hurt by the project—one-half the cost takes private property without due process of law, constitutes arbitrary action, and unreasonable discrimination under the Fourteenth Amendment; and, in addition, is a direct and illegal burden on interstate commerce by railroad.

2. That, even if this new road project could be considered in any aspect an exercise of the police power, even so, under the facts set forth in the bill of complaint, it is so arbitrary and unreasonable, and so

discriminatory and so unnecessarily burdensome on interstate commerce by railroad as to violate the "due process" and "equality" clauses of the Fourteenth Amendment, and the "commerce" clause of the federal constitution. (R., 29-31.)

Appropriate relief in the light of the averments of the bill was prayed. (R., 31-32.)

Answer.

The answer (R., 34-54), so far as now pertinent, is made up largely of general denials of the facts alleged and the conclusions of law based thereon. Part of it, however, becomes important as admissions of which, under Tennessee practice, appellant Railway may now take advantage. *Hutsell* v. *Citizens National Bank*, 166 Tenn., 598, 611.

Pertinent and important portions of the answer follow:

> "It is true that the old routing within the city limits of Lexington as to Highway No. 20 is to be relocated *so that the road may be more usable and dangerous curves may be eliminated and the length of the highway shortened;* but the relocation is as equally available to local traffic as to through traffic." (R., 40.)
>
> . . . . . .
>
> "Answering Section VI of complainant's bill, *respondents are not advised as to the schedule of the complainant's trains over its line of railroad on which the crossing in question is located* . . . (R., 40.)
>
> . . . . . .
>
> "It is true that the location of this crossing is not at a point where Highway No. 20 originally crossed the railway but is at a different point a

short distance away and *the change was rendered necessary to carry out proper construction of the highway.*" (R., 41.)

. . . . . .

"When this highway is completed, *the traffic will no doubt increase very materially* between Nashville and Memphis and intermediate points, and especially over the highway at the point of the location of this crossing.

"As to the traffic count of passenger automobiles, school buses, trucks, horse-drawn vehicles and horses using this crossing in the month of September, respondents are not advised as to the correctness thereof, but if the same is material they demand proof." (R., 41.)

. . . . . .

"Further answering, respondents are not advised as to the number of automobiles registered in Henderson, Decatur and Chester counties for the year 1930 and if said number becomes material, respondents call for proof." (R., 42-43.)

. . . . . .

". . . and he likewise acted properly *from an engineering standpoint* in that by the elimination of said grade crossing and the relocation of the highway conformable therewith, *a better highway was provided from an engineering standpoint.*"* (R., 50.)

The object of quoting these portions of the answer is to demonstrate; first, that this project was conceived and designed for the commercial convenience of those engaged in the transportation business by motor vehicle; and, second, that the constituted authorities had never made an effort to ascertain the facts which would be indispensable to any intelligent and appropriate exercise of the police power.

*All italics in this brief are ours.

Findings and decision of the trial court.

The trial court found, with a minor exception immaterial here, that the testimony fully sustained the averments of fact in the original bill of complaint as amended, saying in part:

> "The Court finds from the evidence that there are no facts to sustain this averment and that in the interest of commerce by motor vehicle on the public highways, this was a proper engineering project, properly conceived, located, designed and constructed. As an engineering and economic project it was perfectly sound. The Court further finds that the cost of such underpass, the same being estimated at Seventeen Thousand Four Hundred ($17,400.00) Dollars is not unreasonable or excessive. However, the Court finds that this underpass did not involve an exercise of the police power any more than many other features of this project, such as the elimination of curves, grades, widening the pavement *et cetera.*
>
> "5. The bill of complaint sets out very elaborately, directly and also through incorporation of numerous exhibits, a detailed state of facts on which complainant Railway relies to support its challenge to the constitutional validity of the Tennessee acts under attack. Except in the one particular just referred to in the immediately preceding paragraph of this memorandum opinion, *the Court finds that the testimony fully supports all such averments of fact.* There can be no doubt under the testimony that this underpass is a part of a state-wide and nation-wide plan to foster commerce by motor vehicle on the public highways, the result of which is to afford competition with railroads and that the decision to build this underpass, its location and construction, was not in any proper sense an exercise of the police

> power, but rather, as set forth in the bill of complaint, pursuant to a general plan of internal improvement fostered by the Congress of the United States in conjunction with the several states to make a nation-wide system of super-highways in the interest of interstate commerce by motor vehicle, much of which is in active competition with the railroads themselves. *All of the detailed facts and the ultimate conclusions as set out in the bill of complaint are, as aforesaid, fully supported by the testimony with the one exception above noted.* The Court, therefore, finds as a fact, with the one noted exception, that the facts relied upon as rendering the statute unconstitutional are all as alleged in said original bill as amended." (R., 415-416.)

Based on such findings, the trial court held the order and the Tennessee statutes which were the basis thereof invalid under the Constitution of the United States. (R., 416-417.)

Proceedings in the Supreme Court of Tennessee.

The respondents in the trial court, appellees here, appealed to the Supreme Court of Tennessee and neither in their assignments of error nor otherwise challenged the accuracy of the findings of fact of the trial court. (R., 417-418.)

The Supreme Court of Tennessee, in its opinion (167 Tenn., 470, 71 S. W. (2d) 678) (R., 419-429) accepted these findings of fact, so that *appellant Railway is here with the unchallenged findings of fact of the two lower courts in accordance with its contentions.* Under decisions of this Court the facts so found will be considered controlling here. *First National Bank* v. *Littlefield*, 226 U. S., 110, 112.

The Supreme Court of Tennessee held, so far as now pertinent, as follows:

(a) That while municipal ordinances may be held void upon a showing of changed conditions ". . . we find no authority for extending that rule to statutes." (R., 421.)

(b) That "The question of whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions . . . involves a matter of legislative policy. . . . Courts cannot go into and consider such questions . . ." (R., 422.)

(c) That the project in question ". . . falls clearly within the police power of the state . . ." and was, therefore, not subject to review. (R., 429.)

The facts.

1. All of the highway in question, of which new Route 20 is only a part, is a federal and state aid project. (R., 184.)

2. Eliminating municipal streets, there are now more than 3,000,000 miles of public roads in America, of which approximately 10 per cent are part of state highway systems and 6.5 per cent part of the federal aid system. In Tennessee there are about 70,000 miles of public roads, outside of municipalities, of which approximately 7,000 belong to the technical state highway system and about 3,500 are federal aid roads. (R., 60, 182-184; Ex. Sup., 92.)

3. This gigantic road building program is costing the American taxpayers an average of nearly

$2,000,000,000.00 a year, to which Tennessee's taxpayers have contributed in the last several years approximately $250,000,000.00. (R., 61-75; 131-132; 140; 186; 197-198; 209; 351-352.)

4. The funds for this road-building program have been obtained largely from borrowed money and general taxes. Special motor vehicle taxes and gasoline taxes pay less than one-half the cost of construction and maintenance. (R., 66-75; 352; Ex. Sup., 94-106.)

5. Practically no part of motor vehicle taxes, including the gasoline tax, goes to support the schools and operations of government, but are expended almost entirely on facilities which motor vehicles use in the transportation business. On the other hand a large part of railroad taxes goes directly to the support of public roads and no part of their taxes goes to the construction and maintenance of facilities for them to use in the transportation business. (R., 7, 74-75; 122-123; 156, 162, 165-170; 349-351.)

6. The policy of the federal government, wherein the several states cooperate, as evidenced by various acts of Congress, is to construct a nation-wide system of highways, interstate in character. On all federal aid roads the government is the dictator. (R., 59, 128, 184, 189, 202, 212, 243-245; 301, 355.)

7. Over these 3,000,000 miles of highways swarm over 26,000,000 motor vehicles, some over seventy feet long weighing with load over fifty thousand pounds, killing an average of about 35,000 citizens a year, injuring an average of about 1,000,000, making havoc with property, producing a condition worse than war. (R., 5, 76, 82-88, 96-108, 113, 121, 225-226, 357; Ex. Sup., 71.)

8. The drivers of motor vehicles generally pay little or no attention to any laws or rules of the road and by their own negligence and criminal indifference to consequences are almost without exception the authors of their own misfortune. (R., 107, 130; 303-304, 309; Ex. Sup., 178.)

9. The number of railroad grade crossing accidents are negligible in comparison with total automobile accidents so that, if every grade crossing in America were separated, it would prevent only 5.1 per cent of the deaths resulting from automobile accidents and less than one-half of one per cent of the injuries resulting from their operation. New crossings are being built faster than old ones are being eliminated, although the railroads are spending directly about thirty millions annually for such purposes. Commercial motor vehicles spend nothing directly for such purposes. (R., 108-9; 119; 130; 296.) *Appellant Railway has been forced in recent years to spend large sums for such purposes.* (R., 297, 400-401.)

10. The public highways, particularly federal and state aid roads, are no longer constructed for or devoted primarily to local, social, or personal use but to commercial transportation just as the railroads. They are no longer "feeders" for railroad traffic. (R., 78; 121, 127-128; 260-261; 287; 343-347; 359-364; 389-390; 404-406.) Motor vehicle trains comparable in size and speed to railroad trains monopolize the highways, primarily the through federal aid roads. (R., 85, 121, 262, 357.) A third of all collisions involving train movements result from automobiles running into trains. Some of the worst railroad accidents in history have been produced by careless motorists. (R., 100, 107, 117, 143, 267.)

Trains now need protection against their competitors doing a public transportation business by motor vehicle on the public highways. (R., 95-109; 117; 129; 131, 134, 267, 292, 391-392; 402.) Commercial operation, —especially trucking,—on the highways is a development of the last few years. (R., 88, 122, 125, 368.

As Commissioner Baker admits, ". . . a new order of things . . ." (R., 214) has resulted from the recent advent of good roads and motor vehicles.

11. In Tennessee railroad operations are strictly regulated in the interest of public safety. Automobiles are substantially without regulation. (R., 305-307.) The cost of grade crossing protection has been borne exclusively by the railroads. The cost of grade crossing elimination has been borne largely by the railroads. (R., 163-4, 194, 266, 296, 307, 348, 396.) No motor vehicle operator, no transportation agency using the highways is asked or expected, under the law, to contribute a single dollar directly to grade crossing protection or elimination. (R., 119; 130, 163-164; 194; 296, 300.)

12. This vast new transportation business, in direct and successful competition with the railroads, has taken from them about 90 per cent of their passenger business, about 75 per cent of their distributive freight and made great inroads into heavy long distance carload movements. (R., 79-89; 121-122; 125-128; 344-345; 358-364; 367-372; 375; 383; 405-406; 408-410.)

Further, unregulated motor transportation has forced drastic rate reductions by the railroads to try to retain traffic on their rails. (R., 80; 377-8; 387.) Appellant has suffered enormously, wholly aside from

the depression, on this account. (R., 277; 282, 286, 361-370.) The commercial use of the public highways is now fairly comparable to the railroad systems of the nation. (R., 79-89; 125-128; 138; 359-370; 405-409.)

13. Traffic, rate, and transportation problems, indeed the very life of the nation, have been revolutionized by the advent of the internal combustion engine and the newly developed national highway system. (R., 79-89; 121-122; 127; 345; 359-365.) The enormous volume of competition with appellant is fully shown. (R., 365-366; 369; 371-372; Ex. Sup., 19-21; 47, 49; 73.) *As a result interstate commerce by railroad is in real jeopardy.* (R., 94-95; 125-128; 141-143; 262; 278; 282; 286; 345; 358-359; 365; 367-372; 382-388; Ex. Sup., 107-109.

14. The modern grade crossing problem both in fact and principle is wholly different from that of thirty years ago. There are trains on the highways as well as on the railroads. Motor vehicular use of a crossing will, on the average, exceed train use by a hundred to one—frequently even more. (R., 95; 120; 126; 153; 162-164.) Problems incident to animal-drawn vehicles no longer, to any substantial degree, exist. (R., 164; 190; 192; 217; 356.) Elaborate discussion of the changed conditions at grade crossings was testified to by some of the greatest technical men in the country as well as by economists of like renown. (R., 5-6; 95-96; 115-117; 120-121; 129-131; 262-275; 372-374; 390-394; 402; 410-411; 413-414.)

15. Regulation and taxation of railroads has been in effect for years. Commercial transportation on the highways is of very recent origin and, so far as interstate, is wholly unregulated. (R., 134; 146; 214.) All

railroad taxes go to the support of the general government and none is expended on facilities for them to use. (R., 91; 170; 375; 384.) Of the taxes collected from railroads in Tennessee, practically twenty per cent goes directly to the construction of roads for their competitors to use. (R., 352; Ex. Sup., 111, 113.)

The tax burden on motor vehicles, particularly those in commercial use, is negligible as compared to the burden on railroads. (R., 167-171; 179; 194; 265; 328-335; 349-350; 352; Ex. Sup., 51-59; 191-193.) With minor exceptions all motor vehicle and gasoline taxes go exclusively to construct and maintain highways and facilities for motor vehicles to use. (R., 68, 73-74; 91; 122; 131-132; 162; 197; 367; 411; Ex. Sup., 76-89; 113-125.)

Due to this discrimination in taxation it only costs commercial transportation agencies by motor vehicle, on the average, about seven cents of their gross revenues to obtain a highway on which to do business and receive governmental protection; whereas, it costs the railroads of the nation about twenty-eight cents, and of Tennessee about thirty-three cents, out of each dollar of gross revenue to obtain the same thing. (R., 90-92; 120; 323-324; 334; 374-375; 412-413.)

16. This new road from Nashville to Lexington is of the most modern type, built to federal standards at excessive cost, traversing poor country, thinly populated. (R., 160-161; 174-177; 212; 271-273; 346-347; Ex. Sup., 126.) It was deliberately and carefully designed and constructed for the fastest, and heaviest interstate commercial motor vehicles. (R., 176, 185, 204, 223; 246-7; 315; 347; 355.) ". . . speed and weight and volume of traffic" were the controlling fac-

tors. (R., 205.) *It would take the purchase price of nine thousand acres of the average adjacent land to pay for each mile of this super-highway.* (R., 176.) Every possible local need could have been provided for with a road costing less than half of the excessive cost of this modern super-highway. (R., 161, 336.)

17. The federal and state authorities deliberately designed this road as a through highway to accommodate new through traffic and also that now moving over State Route No. 1, which is Federal Route 70. (R., 228-229; 238.) The only justification for this road is the anticipated future traffic, largely interstate. Commissioner Baker admits (R., 189-190) that the new road was not designed for "local traffic" but (R., 192) for "an increase in traffic both as to density and speed"; . . . and "with a view to relieving delays, as well as removing the hazard to the traffic . . ." (R., 157; 192; 199, 203, 204, 219-220; 238; 240; 246; 251.)

Before this new road was constructed traffic in this territory was negligible, as will be seen from the density maps filed as Exhibit 6 to the testimony of Highway Commissioner Baker. (Ex. Sup., 7-8.)

State Engineer Goetz estimated that the *through* motor traffic on this new road would increase one thousand per cent! (R., 230.) Engineer McEwen agreed. (R., 235.)

18. It is the general policy of the federal government to force grade separations on federal aid projects "primarily for the safety of traffic using the highways." (R., 203; 212; 243.) The federal government, having no police power, naturally made no investigation of any facts except traffic needs and possibilities.

It was the federal government alone which initially determined that the new Route 20 should cross the Railway's tracks by an underpass. To use the language of Commissioner Baker this underpass was a "requirement by the (Federal) Government." (R., 202; 212; Ex. Sup., 130-152; 166-173.) The order, here under attack, was, of course, issued by the Highway Commissioner of Tennessee.

19. Traffic on the old Route 20, which is still being continued, was largely local. (R., 159, 162, 176-177; 189, 199, 214; 247-248; 310-314; Ex. Sup., 25-45; 63-70.) Its crossing of the Railway's tracks in the little town of Lexington was not dangerous and had been protected at the sole expense of the Railway by the most modern electrical devices. (R., 165, 173-174, 211; 241; 316-317; 337-338.) Tennessee state officials were under the obligation, by virtue of the provisions of Chapter 132 of the 1921 Public Acts of Tennessee, to designate this crossing as a dangerous one, if such were the fact. Not being dangerous, it had never been so designated. (R., 309.) The public authorities of the city and county never suggested either the necessity or desirability of a grade separation at this point. (R., 156, 251; 356.) The idea was conceived in Washington, *as a part of a general plan*, without regard to local conditions. (R., 202-3; 243.) The volume of local traffic was not investigated. (R., 235.) None of the public officials, state or federal, ever made that character of investigation of the facts indispensable to a proper and intelligent exercise of the police power. (R., 210; 212-213; 228; 240.)

20. When the Highway Commissioner's order, without hearing, directing the Railway to pay one-half the

cost of this underpass, was made, appellant Railway operated, over the point of the proposed underpass, seven trains each way each 24 hours. Before the end of the trial it operated only six. Approximately one-half of these operated between midnight and daybreak. (R., 318-319; 322.)

21. After the present suit had been brought, but before the taking of the proof had been completed, the project was finished. Traffic over old Route 20 and the Clifton Street crossing remained substantially unchanged. The use, so far, of new Route 20 and the underpass in question has not kept pace with the anticipations of the traffic experts of the state and federal governments. Appellant Railway has been relieved by this project of neither danger nor expense. (R., 321-323; 337-339; 397-398; Ex. Sup., 181-189.)

22. The construction of this underpass having been decided upon by federal officials at Washington pursuant to a general plan, Tennessee officials ordered appellant Railway to separate the anticipated crossing, paying directly one-half the cost without any studies as to the dangers. Not a Tennessee Highway official knew the fundamental facts, or even sought to learn them, to determine the dangers that might exist if there were to be a grade crossing instead of an underpass. (R., 210-213; 228; 240.)

Four state highway officials testified, namely, Messrs. Baker, Goetz, McEwen and Moreland. *None of these men knew or had ever tried to find out how many trains were operated over the proposed crossing or at what time.* (R., 210-213; 228; 240.) Their testimony demonstrates that, aside from the desire to get federal aid, what they were considering was the best

design from an engineering standpoint for fast, heavy, *future*, commercial transportation on the highway. For example, Engineer Goetz said: "The traffic density is a primary feature in the design of any new road improvement. Other features of design are speed and vehicle width." (R., 219.) Again the underpass was justified because of anticipated future "foreign and intrastate traffic which is not familiar with the local conditions at this crossing. (R., 223.)

The underpass was dictated as a matter of engineering to meet "expected conditions," without any public official ever knowing or trying to find out how many trains went over this crossing and when. (R., 220-221.) Their studies related to traffic density, present and prospective. (R., 219-221; 233.)

It was "the economical thing to do, both from a construction standpoint and the safety of the traveling public. . . ." (R., 232.)

The Tennessee authorities were primarily interested in only two things, first, in getting federal aid, and, second, in promoting through transportation by motor vehicle.

The construction of this underpass was determined on precisely the same principles as straightening curves and reducing grades which involved an exercise of engineering skill and judgment, not of the police power. (R., 192; 205.) The trial court so found and that finding of fact has never been challenged. (R., 415.)

23. The demoralizing effect of this new, unregulated transportation agency, in direct competition with railroads, on the traffic, rates, and revenues of appellant Railway is shown in detail. (R., 80; 94-95; 125-128;

141-143; 278; 282; 286; 345; 358-359; 365; 367-388; Ex. Sup., 107-109.) Changed conditions at grade crossings, due both to the character of traffic on the highways and to new operating conditions on the railroads themselves, were proved in detail and are undisputed. (R., 5-6; 95-96; 115-117; 120-121; 129-131; 262-275; 372-374; 390-394; 402; 410-414.)

Appellant Railway, as railroads in general, is shown, without dispute, to be in actual jeopardy for continued operations under private ownership, due to this giant, unregulated competitor enjoying enormous subsidies from the governments of the United States and the several states. (R., 79-95; 121-128; 141-143; 262; 278; 282; 286; 345; 358-359; 365-388.)

24. It is undisputed that an excellent road, adequate to take care not only of all local traffic but also of all reasonable traffic, could have been built for less than half the cost of this new super-highway. *This enormous excess cost was made necessary solely to take care of excessively large and heavy motor vehicles on the public highway.* (R., 123-125; 149-150; 152-153; 336; Ex. Sup., 81.)

25. Such highways are no longer "feeders" for the railroads but almost exclusively rights of way for their competitors. (R., 78; 121, 127-128; 260-261; 287; 343-347; 359-364; 389-390; 404-406.)

SPECIFICATION OF ERRORS.

Appellant's assignment of errors (R., 433-439) gives in detail the grounds relied on for sustaining its challenge to the validity of the Highway Commissioner's order and the Tennessee statutes on which it was based, and these, briefly, are:

I.

The grade separation project in question was a mere engineering incident of one of the units in a nation-wide federal and state highway, constructed for the convenience of interstate commerce by motor vehicle in competition with the railroads. The decision to have an underpass instead of a grade crossing was made at Washington by the Federal Bureau of Public Roads. The power exercised, therefore, was not the police power, so to require the Railway, alone, to directly help finance this internal improvement constituted a taking of private property, without compensation, contrary to the "due process" clause of the Fourteenth Amendment.

II.

Since the advent of automobiles and a nation-wide connected system of super-highways, there has been a revolution in transportation and the incidental grade crossing problem. Under modern conditions, wholly different from those obtaining some years ago, to require a railroad, alone, to directly assist in financing grade separation projects is arbitrary action and unreasonable discrimination under the Fourteenth

Amendment and a direct and illegal burden on interstate commerce.

III.

This new super-highway, with its incident underpass at Lexington, is merely a part of the general policy of the federal and state governments to foster interstate commerce by motor vehicle in competition with the railroads. To require the railroads, alone, and not their competitors on the public highways, to help directly finance projects of this character is arbitrary action and unreasonable discrimination under the Fourteenth Amendment, and a violation of the "commerce" clause of the Federal Constitution, even if the power exercised were police.

IV.

There is now, and for years has been, material and vicious discrimination against railroads in the matter of taxation, regulation, the financing of grade crossing protection and elimination and otherwise in favor of their successful competitors on the public highways. The Tennessee statutes under attack so accentuate that discrimination as to transgress the "equality" clause of the Fourteenth Amendment.

V.

These new, through federal aid roads, such as the one in question, are both in law and fact in the same category for motor vehicular traffic as railroad rights of way are for railroad traffic. Therefore, when such a new road crosses an old road, the new one must, un-

der the Fourteenth Amendment and the "commerce" clause, pay the cost of the crossing.

VI.

Under modern conditions, when trains need protection against highway users rather than *vice versa*, the rules of law for financing grade separation projects, originating and crystallizing in "horse and buggy" days, must be restated to conform to the conditions of this present "motor age." This is essential under not only the "due process" and "equality" clauses of the Fourteenth Amendment but under the "commerce" clause of the Constitution because interstate commerce by railroad is being put in serious jeopardy by such burdensome state action as that herein complained of.

ARGUMENT.

The theory of appellant's case is that the revolution in transportation, fully proven without dispute, necessitates a modification and restatement of ancient rules and principles relating to the financing of grade separations which grew up and became crystallized under conditions which have long since ceased to exist.

Commercial transportation on the public highways, in successful competition with the railroads, is one of the outstanding facts of the last decade and the economic and social changes resulting therefrom are matters of common knowledge.

The use of state and federal aid roads is no longer primarily either local or social, but commercial. Great motor transportation companies are doing a commercial business on the rights of way furnished by the public just as the railroads are doing business on their privately owned, constructed and maintained rights of way—and the competition is keen and successful.

Conditions at grade crossings, due to changed conditions, have so altered that today trains are in need of protection against motor vehicles, instead of motor vehicles (there are few horses, buggies, etc., left) needing protection against trains.

The growth of commercial transportation on the public highways has been so swift and so great that studies thereof made by the Interstate Commerce Commission in 1931 had become obsolete by July, 1933, (195 I. C. C., 5, 7); and is jeopardizing the very existence of the railroad industry, yet not a single motor transportation company, making its money out of the

use of the public highways, is ever expected or asked to contribute one single dollar, directly, to grade crossing protection and elimination. *This burden, based on conditions long since obsolete, is still being borne by the railroads alone.*

The recent appropriations by the federal government, running into the hundreds of millions of dollars a year, for the further construction of federal and state roads, to be used in active competition with the railroads, is a matter of common knowledge. Yet the grade crossing elimination rules, the outgrowth of the "horse and buggy" era, remain to date unchanged in this "motor age."

The object of this suit is to seek a change in those ancient rules to conform to new and entirely different conditions.

It is only proper here to say that appellant has no criticism to make of the design or cost of the particular underpass in question from an engineering standpoint. Further, considering the object which the federal and state governments had in mind, namely, the building of the most modern through route for commercial motor transportation, the lay-out and construction of this super-highway, with its varying incidents, including this underpass, was proper. Our challenge is to the power of government, under new and modern conditions, to impose any part of the cost directly on appellant Railway.

Summary of argument.

1. This new route across Tennessee—the fourth of its kind (R., 353-354) was conceived, designed and built to take care, not of local and social needs, but anticipated future commercial transportation by motor vehicles, largely interstate, in competition with the railroads.

2. There has been an actual revolution in the transportation and grade crossing problem due to the advent of the motor vehicle, and the new nation-wide system of super-roads, designed and constructed to promote the public transportation business by motor vehicle in competition with the railroads.

3. Conditions have so changed that it is now the railroads which need protection at grade crossings. Trucks larger than box cars, loaded with dynamite—see *Traveler's Protective Association* v. *Prinsen*, 291 U. S., 576,—gasoline, coal and every conceivable class of freight, use these crossings times without number in excess of railroad use.

4. Undeniably this Court and other courts have held, and properly so under wholly different conditions, that railroads could be made, alone, to contribute directly to the cost of grade separations, but the reasons which gave birth to those decisions have ceased to exist. The reason for the rule failing, the rule itself must, under the organic law of the Nation, be changed to conform to modern conditions.

5. Interstate commerce by railroad may not constitutionally be destroyed or seriously impaired or burdened by state action in fostering commercial transportation by motor vehicle.

6. Discrimination against the railroad industry in favor of its competitor by motor vehicle exists to such a degree, both in taxation, regulation and otherwise, as to threaten the very life of the railroad industry.

7. Grade separation projects, such as the one involved in the case at bar, are now merely an engineering detail in the construction of through routes for commercial motor transportation in competition with the railroads, so that no longer may the railroads constitutionally be required, alone, of all the citizens, to make direct contribution to the cost of such work.

8. Under these conditions, the ancient rule that railroads alone could be made to directly finance such grade separation projects must, under the "due process" and "equality" clauses of the Fourteenth Amendment and the "commerce" clause of the Federal Constitution, be restated to make impossible that which the Tennessee statutes and the order of the Tennessee Highway Commissioner, pursuant thereto, are actually doing in the case at bar.

With this summary of our views we now proceed in some detail to enlarge upon them.

I.

A statute may be reasonable and, therefore, valid at one time or under one set of circumstances, yet unreasonable and, therefore, invalid under different circumstances. A statute may be perfectly valid on its face, yet under a given state of facts, disclosed by evidence, be invalid. While the fundamental principles of the organic law of the Nation remain unchanged, their application to changing conditions must and does call for a restatement of ancient and obsolete rules.

As before stated, the Supreme Court of Tennessee, in its opinion in this cause (R., 421), specifically held that if a statute be valid when passed, it continues valid forever. This Court, fortunately, has held otherwise.

In the recent case of *Snyder* v. *Massachusetts*, 291 U. S., 97, 115-116, 117, this Court said in part:

> " 'A statute may be invalid as applied to one set of facts and yet valid as applied to another.' . . . If this is true of the action of the legislative department of the state laying down a general rule, it is even more plainly true of the action of judicial or administrative officers dealing only with the instance.
>
> . . . . . .
>
> "What is fair in one set of circumstances may be an act of tyranny in others."

Again in *Funk* v. *United States*, 290 U. S., 371, 382, 383, 385, this Court said that when the legislative branch of government failed to change ancient rules to meet current conditions, then it became the duty of the courts to decide cases ". . . in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past. . . . The final question . . . is

not that of the power of the federal courts to amend or repeal any given rule or principle of the common law . . . but it is the question of the power of these courts, in the complete absence of congressional legislation on the subject to declare and effectuate, upon common-law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. . . . 'This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself' . . . 'where the reason of the rule ceases the rule also ceases.' "

So in *Nebbia* v. *New York*, 291 U. S., 502, 525, this Court said:

> "It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

To the same effect is *Village of Euclid* v. *Ambler Realty Company*, 272 U. S., 365, 387, where this Court specifically recognized that:

> "Such regulations are sustained, under the complex conditions of our day . . . which, before the advent of automobiles . . . would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of

their operation. In a changing world, it is impossible that it should be otherwise."

So, too, are many decisions, of which the following are typical:

Abie State Bank v. *Bryan*, 282 U. S., 765, 766.
United Railways v. *West*, 280 U. S., 234, 249.
Galveston Electric Co. v. *Galveston*, 258 U. S., 388, 400.
Seaboard Air Line Railway v. *Blackwell*, 244 U. S., 310.

II.

Constructing highways and making them safe for non-existent but anticipated fast, heavy, commercial traffic, in direct competition with railroads, is not an exercise of the police power.

The Supreme Court of Tennessee held that the proposed grade separation project was an exercise of the police power. (R., 429.) The undisputed facts, as found by the trial court, are that the conception and construction of this underpass were based upon the same practical engineering and traffic considerations as the elimination of curves and grades, width and thickness of pavement, etc. (R., 415.)

This Court has many times defined in general terms the meaning of the words "police power." In *Home Building and Loan Association* v. *Blaisdell*, 290 U. S., 398, 437, this Court approved a former decision, saying:

"This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people. . . ."

In *Lawton* v. *Steele*, 152 U. S., 133, 136, this Court said:

> "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance."

So the Supreme Court of Tennessee has frequently held that the police power is the sovereign right to protect the health, safety and morals of the people. Of the Tennessee cases, *Motlow* v. *State*, 125 Tenn., 547, 589, is typical.

But the power to design and construct roads and make them safe for commercial traffic is a prerogative of sovereignty different from the police power. This was expressly held by this Court in *Southern Railway* v. *Virginia*, 290 U. S., 190, 195, where it was said that an order requiring a railroad to finance a grade separation project ". . . . is no mere police regulation."

So in *Stephenson* v. *Binford*, 287 U. S., 251, 276, this Court, referring to regulation of motor vehicle traffic under new and modern conditions said that a state in such matters acts "as master in its own house." That is, the state was acting in its proprietary capacity rather than in the exercise of the police power.

The power to layout, design, construct and maintain roads is a prerogative of sovereignty, involving an exercise of the power of eminent domain. The nature of this power and its exercise is not changed to the police power merely because the sovereign undertakes

to build and maintain the roads so that traffic thereon may be safe.

While the decisions and text books do not differentiate as clearly as might be desired between these different powers, their differences and the delimitations of each are recognized in the following:

Cincinnati v. *L. & N. Railroad*, 223 U. S., 390, 404.
United States v. *Boston Elevated Ry. Co.*, 176 Fed., 963.
Fryar v. *Hamilton County*, 160 Tenn., 216, 219.
State Highway Department v. *Mitchell's Heirs*, 142 Tenn., 58, 66, 72, 74.
Scopes v. *State of Tennessee*, 154 Tenn., 105, 111, 112.
State ex rel. v. *Cummings*, 130 Tenn., 566, 572.
Coyne v. *Memphis*, 118 Tenn., 651, 663.
Franklin & Columbia Turnpike Co. v. *County Court*, 27 Tenn., 342.
Elliott on Roads and Streets, 4th Ed., Sec. 204 and Sec. 465.
Lewis on Eminent Domain, 3rd Ed., Sec. 6, pages 13-16.
Cooley on Constitutional Limitations, 7th Ed., page 830, quoting with approval the decision of Chief Justice Shaw in *Commonwealth* v. *Alger*, 7 Cushing, 53, 84.

The mere construction and maintenance of a public road by the state has never been considered an exercise of the police power and this cannot be altered because the engineers of construction try to build the road so that traffic thereon will be safe. If the power exercised were not police, it follows as of course that taking appellant's money to finance the underpass was a taking of private property without due process of law.

The underpass in question was considered a mere engineering detail in building a road so that commercial traffic thereon would be safe. (R., 415.) Even if it involved an exercise of the police power, as we shall undertake to demonstrate later, it would be subject to other provisions of the organic law of the Nation and, therefore, if in conflict therewith, invalid.

III.

The government of the United States, under the commerce and post roads provisions of the Federal Constitution, may build and construct post roads, but it has no police power and the mere fact that it builds or has built, such roads safely does not change the nature of the power exercised.

The highway here involved, is a federal aid highway under Title 23, Section 2, of the United States Code. The first paragraph of Section 6 of said Title 23, is as follows:

> "In approving projects to receive Federal aid under the provisions of this chapter the Secretary of Agriculture shall give preference to such projects as will expedite the completion *of an adequate and connected system of highways, interstate in character.*"

It is also a post road under Chapter 14 of Title 39 of the United States Code.

It is undisputed in this record that the original determination that there should be a grade separation at the crossing in question emanated from Washington, pursuant to a general plan of the Federal Bureau of Public Roads and that officials of the State of Tennessee acquiesced in order to get federal aid—which is nothing new or novel for Tennessee as evidenced by the

opinion of the Tennessee Supreme Court in *Highway Department* v. *Mitchell's Heirs*, 142 Tenn., 58, 72, where the court said:

> "This alteration was thought necessary by the highway commission to make the road conform to federal requirements *and to obtain federal aid.*"

The fact, as aforesaid, that the federal government may insist on federal aid roads being constructed safely does not mean that the police power is being brought into play. Except in the District of Columbia and possibly some territories not a part of any one of the several states, the federal government has no police power.

United States v. *DeWitt*, 9 Wallace, 41, 45.
Fertilizing Company v. *Hyde Park*, 97 U. S., 659, 667.
Hart Coal Company v. *Sparks*, 7 Fed. Supp., 16, 19.
Cooley on Constitutional Limitations, 7th Ed., 831-832.
Ruling Case Law, Vol. 6, Sec. 190, under the heading of Constitutional Law.

May we be pardoned for observing that what William Tecumseh Sherman and Ulysses S. Grant barely began was completed by the man who invented "federal aid."

IV.

Any valid exercise of the police power requires investigation and knowledge of the factors involving safety, as distinguished from mere traffic considerations.

It will be recalled that neither the city nor county authorities ever suggested the need or desirability for

this grade separation. Under Tennessee law, an exercise of the police power over roads within municipalities is to be exercised by the local authorities to the exclusion of state officials. See

Collier v. *Baker*, 160 Tenn., 571, 574-575.
Southern Ry. v. *State*, 130 Tenn., 261, 264.

Further, appellee's answer in the trial court admitted that even after this lawsuit was brought public officials did not know how many trains appellant ran or at what hours. (R., 40.) Such knowledge is obviously essential to any intelligent and reasonable and, therefore, valid exercise of the police power. The answer discloses, as well as the proof, that the determination to construct the underpass in question was based on traffic and engineering considerations and the desire to obtain federal aid. (R., 41, 50.)

Under *Southern Railway* v. *Virginia*, 290 U. S., 190, the administrative determination, without hearing, that in the interest of commercial traffic on highways there should be an underpass cannot be considered an exercise of the police power. Knowledge of the factors of safety is essential to any exercise of that particular power.

V.

The difference between the engineering and traffic considerations for making a highway safe and convenient for commercial business thereon and a legitimate exercise of the police power has been recognized in several recent cases.

(a) In *Chicago & Northwestern Ry.* v. *Railroad Commission*, 205 Wis., 506, 238 N. W., 365, 366, the Railroad Commission of the state, exercising jurisdiction conferred by statute, ordered the railroad to

construct a viaduct at its sole expense ". . . to provide for the *reasonable convenience* of public travel on the highway. . . ." This order was challenged in the courts on the grounds that it did not involve an exercise of the police power and that it was intended for the convenience of motor vehicular traffic. The highest court of that rather liberal state sustained the railroad, holding that "public convenience" was not a ground on which such an order could be sustained.

(b) In *Sidney* v. *Wabash Ry.*, 333 Ills., 126, 164 N. E., 201, 203, the state through its Commerce Commission, ordered the railway, at its expense, to separate a given grade crossing. The validity of that order was challenged to determine whether it was really an exercise of the police power or in fact a device to favor motor vehicular traffic. The proof showed, as in the case at bar, a crossing not particularly dangerous and the court invalidated the order, holding that it was not really an exercise of the police power, making this interesting and pertinent observation, "*Whether it is reasonable to require a separation of grades is a question of fact, and no general rule can be stated which will serve as a guide for determining the question in all cases.*"

(c) Another interesting case is *In Re*: *Elimination of Grade Crossings Over Tracks of Baltimore and Ohio Railroad*, 124 Ohio St., 406, 179 N. E., 139. There the Highway Department of the state ordered a specific grade crossing eliminated at the expense of the railroad. The evidence showed that the crossing was much more used and a great deal more dangerous than the Clifton Street crossing in the case at bar, yet the highest court of Ohio invalidated the order of the Highway

Commission on the ground that it was for the *convenience* of motor vehicular traffic rather than a proper exercise of the police power.

(d) *Transit Commission of the State of New York* v. *United States*, 284 U. S., 360, involved directly the inviolability of interstate commerce by railroad from impairment by the expense of grade separation projects. There the railroad was ordered to separate several grade crossings at its own expense. The railroad sought authority from the Interstate Commerce Commission to absolutely abandon the railroad. The state authorities challenged the validity of that order. This Court sustained it, holding that the revenues of an interstate carrier might properly be protected from inordinate grade crossing separation costs made for the benefit of motor vehicular traffic.

(e) The last word on this subject, fortunately, is a recent opinion of this Court in *Chicago, St. P., M. & O. Ry.* v. *Holmberg*, 282 U. S., 162. The Railway Commission of the state of Nebraska ordered the railway to separate, at its expense, a private grade crossing. All the state courts sustained the validity of the order as a proper exercise of the police power. The Railway claimed that the proposed grade separation was not an exercise of the police power in any proper sense but rather that it was primarily for the convenience, as distinguished from the safety, of traffic.

This Court reversed the state courts and held the order invalid, saying:

> "The Nebraska statute has delegated to the State Railway Commission authority to order

farm crossings underground because either inadequate or dangerous, if circumstances warrant. But there is nothing in this record to suggest that the order of the Commission was either asked or granted as a safety measure. The Commission did not find that the crossing was dangerous either to the public, the litigants, or their property. Neither did it find that this crossing was in anywise different from the usual farm crossing at grade. True, there was testimony that cattle passing over the crossing needed to be attended and controlled to prevent injury to them by trains. But this was no more true of that crossing than of surface farm crossings in general. The case is one of a single track branch line. The track is straight and it was conceded on argument before this Court that there were only four trains a day. While there are bare assertions in the testimony that the private crossing was dangerous, there was no evidence of any danger beyond that which would attend the use of any farm crossing. Neither the Commission nor the state court regarded the statute as condemning all such crossings, doubtless because the statute distinctly includes that type of crossing among those which it authorizes the Commission to require, its words being, 'the Commission may require overhead, underground or grade crossings' as the circumstances may warrant. It is plain that the Commission proceeded upon the assumption that the statute authorized it to compel plaintiff to establish the underground pass for the convenience and benefit of defendant in the use of his own property, and that that alone was the ground and purpose of the order. The application thus given to the statute deprives plaintiff of property for the private use and benefit of defendant, and is a taking of property without due process of law, forbidden by the Fourteenth Amendment. *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S., 403; *Missouri Pacific*

Ry. Co. v. *Nebraska*, 217 U. S., 196; *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S., 340; *Great Northern Ry. Co.* v. *Cahill*, 253 U. S., 71." (Pages 166-167.)

The underpass in question was a mere engineering detail, based upon traffic considerations, just as the determination of the degree of curvature, gradients and other construction details, under the admissions of the answer and the testimony. The trial court so found. (R., 415.) Its finding of the facts was not challenged in the Tennessee Supreme Court. (R., 418.)

VI.

This Court and state courts have, in the past, frequently held that a railroad could be required to separate a grade crossing at its sole expense. Such cases are no longer controlling where the evidence shows that conditions have entirely changed and that commercial convenience of motor traffic rather than public safety is the motivating and controlling influence of action.

Many cases in Tennessee, in the courts of the several states, and in this Court have, in the past, sustained the power of a state to require railroads to separate grade crossings at their own expense. Typical of these cases are the following:

Harriman v. *Railroad*, 111 Tenn., 538.
Chattanooga v. *Southern Ry. Co.*, 128 Tenn., 399, 408-409.
Northern Pacific v. *Duluth*, 208 U. S., 583, 597.
Erie Railroad v. *Board of Public Utility Commissioners*, 254 U. S., 394, 412.
Lehigh Valley Railroad v. *Board of Public Utility Commissioners*, 278 U. S., 24.

We call the Court's attention to the fact that the order under attack in the Erie case, *supra*, was made by the New Jersey Commission in 1915. The state action challenged in the Lehigh Valley case, *supra*, occurred in 1927. Commercial trucking began its present development about 1928. (R., 122; 125; 142; 368.) *Conditions have changed so rapidly in that regard that studies of commercial transportation on the public highways in 1931 had become wholly obsolete by 1933.* (195 I. C. C., 5, 70.)

What the law once was, under conditions no longer existing, is not controlling today. All that was said in the opinions of which those just cited are typical must ". . . be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheaton, 264, 399.

What we are asking for and what we believe that we are entitled to is a restatement of the law, in the light of fundamentally altered conditions, as evidenced by unchallenged proof in the case at bar.

VII.

Assuming that the construction of the underpass here involved be the result of an exercise of the police power, even so, such exercise is subject to the due process of law clause of the Fourteenth Amendment to the Federal Constitution.

We made the point before the Supreme Court of Tennessee that, even if the order of the Tennessee Highway Commissioner here under attack, and the Tennessee statutes, which are the basis thereof, did involve an exercise of the police power, still the exercise of that power is subject to the "due process" clause of

the Fourteenth Amendment. The Supreme Court of Tennessee, however, having held that this grade separation project was within the police power of the state concluded that this was final. (R., 429.) This Court has held otherwise many times.

In *Southern Railway* v. *Virginia*, 290 U. S., 190, 196, 54 S. Ct., 148, 150, this Court said:

> "The claim that the questioned statute was enacted under the police power of the state and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every state power is limited by the inhibitions of the Fourteenth Amendment."

Again in *Pennsylvania Coal Company* v. *Mahon*, 260 U. S., 393, 413, this Court, speaking through Mr. Justice Holmes, said:

> "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power."

So again in *Lochner* v. *New York*, 198 U. S., 45, 56, this Court said:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy . . . The claim of the police power would be a mere pretext —become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. . . ."

As a matter of fact, the Supreme Court of Tennessee has, on numerous occasions other than the case at bar, recognized this rule. See

Motlow v. *State*, 125 Tenn., 547, 590.
Campbell v. *McIntyre*, 165 Tenn., 47, 52-53.

The holding of the Tennessee Supreme Court, that its conclusion that the power herein exercised was the police power settled this case, cannot stand the test of applicable decisions of this honorable Court.

VIII.

Further, a state may not, even in the intelligent and reasonable exercise of the police power, burden interstate commerce.

If we assume that the power herein exercised were the police power and if we go further and assume that, considered alone, it appears to be reasonable, yet if, as a matter of fact, the exercise of such power was a direct, serious and immediate burden on interstate commerce the order of the Tennessee Highway Commissioner and state statutes on which it is based would be invalid under the "commerce" clause of the Federal Constitution. That the undisputed proof shows such direct burden cannot be and has not been denied.

The Supreme Court of Tennessee, as aforesaid, considered that, because the police power was involved, the state was subject to no such limitation as here claimed.

As far back as *Railroad* v. *Husen*, 95 U. S., 465, 472, 473-474, this Court, referring to the powers of a state, said:

> "It may not, *under the cover of exerting its police powers*, substantially prohibit or burden either foreign or interstate commerce."

In *Sanitary District of Chicago* v. *United States*, 266 U. S., 405, 426, this Court, referring to the power of the federal government under the "commerce" clause said:

> "There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants."

In *Florida* v. *United States*, 292 U. S., 1, 12, this Court said:

> "That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body."

To the same effect are many decisions, of which the following are typical:

Colorado v. *United States,* 271 U. S., 153, 163.
Missouri v. *Kansas Natural Gas Co.,* 265 U. S., 298, 306.
St. Louis & San Francisco v. *Public Service Commission,* 254 U. S., 535.
McNeill v. *Southern Railway Co.,* 202 U. S., 543, 561.

The fact is, as disclosed by undisputed testimony, that grade crossing protection and elimination, [*and more new crossings are being built each year than are separated* (R., 108),] designed for the benefit, primarily, of competing commercial transportation on the public highways, is costing the American railroads directly over $30,000,000.00 a year—a burden which no commercial motor company is ever required to directly bear in whole or in part. Of this appellant is bearing its share. (R., 108-109; 299; 400-401.) This together with the colossal expenditures of the federal and state governments, averaging around two billion dollars a year, for public highways is crippling interstate commerce by railroad almost to the point of general railroad bankruptcy. That Tennessee's contribution to this destruction of interstate commerce by railroad is, under the "commerce" clause of the Federal Constitution, invalid is the inevitable result of a consideration of the opinions of this Court.

IX

Where a new right of way of a commercial transportation company, whether railroad or highway, crosses the right of way of an existing commercial road the new one must pay the crossing cost.

The old conditions where a public road, designed for local and social purposes, crossed a railroad right of way have nothing to do with such a case as the one at

bar. The road in question is a commercial venture and stands, before the law, in the same category as if a new railroad track were being built across an old one. Under those circumstances, it may not be denied that the new road must always pay the crossing protection cost.

In the case at bar, this new highway is, in essence, the track for trains of motor vehicles doing a commercial transportation business and its general nature and purpose is no different from that of a railroad right of way.

In *Dyer County* v. *Railroad*, 87 Tenn., 712, 714, the Supreme Court of Tennessee thus stated the general law:

> "It is a well-settled rule of the common law, resting upon the most obvious considerations of fairness and justice, that where a *new highway* is made across another one already in use, the crossing must not only be made with as little injury as possible to the *old way, but whatever structures may be necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way.*"

The fact that, due to modern inventions, this new right of way is for motor vehicles instead of trains cannot change the general law. The new right of way and its users must pay the cost of protecting the crossing of the new over the old—both being engaged in the same business and in active competition.

X.

The Interstate Commerce Commission in a series of elaborate investigations recently held has officially recognized that which is of common knowledge, namely, that commercial transportation by motor vehicle, enormous in proportions, is in active and successful competition with the railroads.

The advent of motor vehicular transportation and the construction of a nation-wide system of superroads paralleling railroad tracks has revolutionized transportation. It has changed the relation between users of the highways and the railroads at grade crossings both from the standpoint of safety and from the standpoint of economics. Transportation on the highways is no longer what it used to be, namely, social, personal and local. It stands exactly in the same category, in point of fact, with transportation on railroad tracks. Sleeping cars operate on the public roads just as on the railroads. Freight cars, refrigerator cars and live stock cars operate on the public highways just as on railroad tracks. *Animal-drawn vehicles with their resulting peculiar problems are almost a thing of the past.* This new condition of necessity calls for a revision of old and obsolete rules and practices.

The Interstate Commerce Commission, has in a series of cases, recognized these changed conditions. On this very point in *Ex Parte* 103, 178 I. C. C., 539, 583, the Commission said:

> "The railroads, as cities expand and public highways multiply in number and use, have been and are being called upon to invest great amounts of capital in alterations of their properties which are often, from a strictly railroad point of view, very largely nonproductive. The burden of these

expenditures must be borne by the public in one way or another, but the question arises whether this burden is being apportioned fairly. *To the extent that it is caused by other than railroad needs and does not increase the traffic of the railroads or save them expense, it may be that this burden should justly be shifted from the shoulders of railroad users.*"

In *Coordination of Motor Transportation*, Docket No. 23400, 182 I. C. C., 263, the Interstate Commerce Commission said:

"The trucking industry in 1929 carried approximately 6 per cent as much freight, measured in ton-miles, as the railroads and 4 per cent as much as all agencies of inland transportation (rail, water, pipe line, highway, and air); in terms of tonnage originated and disregarding the distance transported, it is estimated that trucks originated for inter-city movement 14.2 per cent as much traffic as did the railroads in 1929; there are no comparative figures of the ratio of gross earnings of motor trucks to railroads; trucks serve for the most part points between which large volumes of traffic are carried and usually over routes which more or less parallel those of the railroads; of the traffic carried by truck the greater part would in all probability have moved by rail; truck competition exerts a large influence over rail rates and in the aggregate accounts for losses in rail revenue of several hundred millions of dollars per year; the movement of some traffic has been due to the advent of the trucks and many small points heretofore without rail service are now served by motor; truck service for many classes of traffic is more complete, more flexible, and more expeditious than rail service and frequently at lower rates; the type of service desired is determined on a basis of relative costs; the

nearer the cost of truck service approaches that of rail, the greater the degree of duplication of service." (374.)

. . . . . .

"The growing use of trucks necessitates extensive financing of highway construction and maintenance; their operation is attended by danger to persons and property on or in the vicinity of the highways and is hazardous to the public." (375.)

. . . . . .

"Buses do a larger amount of business relative to that of rail carriers than do trucks; measured in passenger miles, buses did approximately 26 per cent as much business as did the railroads in 1930, and they carried, disregarding the distance transported, 71 per cent as many passengers as did Class I railroads and earned 40 per cent as much gross passenger revenue. A comparison of 1929 with 1923 shows that the railroads have lost 274 million dollars of passenger revenue, and, compared with 1930, 418 million dollars; from 20 to 30 per cent of this loss is attributable to buses and the remainder mainly to the increased use of private cars; to early losses of short-haul business have been added increasing losses of intermediate and to some extent long-haul business; some railroads have ceased altogether to be passenger carriers." (377.)

. . . . . .

"Approximately 25 per cent of intercity bus travel is interstate." (379.)

. . . . . .

"Upon consideration we conclude:

"1. That transportation by motor vehicles, buses, and trucks, over the public highways is, within certain distances, and in certain respects a superior service, and that the rail and water lines should be encouraged in the use of this in-

strumentality of commerce wherever such use will promote more efficient operation or improve the public service;

"2. That there is substantial competition between rail and water carriers on the one hand and motor carriers on the other for the transportation of both passengers and freight and that this competition is increasing;

"3. That such competition is conducted under conditions of inequality, particularly in regard to regulation;

"4. That a contributing cause, aside from the general business conditions, of the present unsatisfactory financial condition of the railroads is the existence of unrestrained competition by rival transportation agencies;

"5. That there is today, and probably would be under normal conditions, an excess of carrying capacity of existing transportation facilities;

"6. That unrestrained competition is an impossible solution of the present transportation problem and is incompatible with the aim of coordination under regulation;

"7. That federal legislation relating to the regulation of motor vehicles operating upon the public highways and engaged in interstate commerce is desirable in the public interest." (379-380.)

In the case of an abandonment of a part of the Burlington Railroad, *Finance Docket No. 8989*, 180 I. C. C., 65, 67, the Interstate Commerce Commission said:

"Due in part to the agricultural depression, but largely as a result of the construction of state highways and the use of trucks and automobiles,

> the volume of traffic handled by the branch, both freight and passenger, has diminished materially during recent years."

Appellant several years ago undertook, successfully, to abandon a portion of its railroad in Tennessee and Alabama. In *Finance Docket 7038*, 150 I. C. C., 539, 541, the Interstate Commerce Commission said:

> "The evidence seems clear that motor vehicles are in general use for travel and for the transportation of children to and from centralized schools and for the movement of corn, cotton, hay, livestock, and milk to consuming or jobbing centers."

The most recent consideration of this problem by the Interstate Commerce Commission was in *Docket 26000*, 195 I. C. C., 5, decided July 31, 1933, where the Commission said:

> "Greatly increasing amounts of traffic are being lost to competing motor and water carriers by the rail lines, . . ." (67.)
>
> . . . . . .
>
> ". . . But the unrestrained and destructive competition between motor carriers, between water carriers, and of both with rail carriers, is not only having an unduly depressing effect upon the revenues of the rail carriers but is exerting a disorganizing influence upon business in general and tending to prevent the maintenance of a stable and nondiscriminatory rate adjustment by the rail carriers. These conditions will undoubtedly exist so long as interstate motor and water carriers are exempt from requirements that their rates be published and maintained on a reasonably stable and nondiscriminatory basis." (67-68.)
>
> . . . . . .

"*The competition of other forms of transportation has grown to such formidable proportions that the opinion expressed in 1931 no longer portrays the situation.* Formerly it was thought that competing motor carriers were taking and would take principally short-haul less-than-carload traffic, and that water carriers would take principally low-grade freight. Time has disproved both of these beliefs. Water carriers are now taking much high-grade long-haul traffic. Trucks are handling less-than-carload freight over long distances and also vast quantities of freight which heretofore has moved on the railroads in carloads, principally commodities which have been most profitable to the railroads. Until the advent of active water and truck competition, rates were made largely on the theory of what the traffic could reasonably bear, low-grade articles having taken relatively low rates and high-grade articles relatively high rates. A large part of the carriers' profit was thus derived from the higher-grade commodities, but today much of the latter traffic either is lost to motor or water carriers or is handled at rates which produce little or no profit. In the 1933 Act the Congress points to the need, in the public interest, of adequate and efficient railway transportation service. But such service cannot be maintained if the cream of the railroads' traffic is to be taken by competitors and if we require reductions on the traffic not subject to competition. If carriers cannot earn enough to pay the cost of service, plus a reasonable profit, all incentive for continuing the service is removed. The country is not ready to abandon its railroads. We believe that it is our duty to do that which presents the greatest promise of preserving in operation the efficient railroad mileage of the country." (70-71.)

XI.

This Court, taking judicial knowledge of the growth of commercial transportation by motor vehicle, has recognized the necessity and legality of state action designed in part to protect interstate commerce by railroad from destruction by unregulated, competing, commercial motor transportation.

The enormous and rapid growth of commercial transportation by motor vehicle on the public highways is undisputed in this record and a matter of common knowledge, of which the courts will take judicial cognizance. *Hart Coal Corporation* v. *Sparks*, 7 Fed. Supp., 16, 19.

Indeed, this Court in *Road Improvement District* v. *Missouri Pacific*, 274 U. S., 188, 194, said:

> "That such a loss in local traffic usually ensues when hard-surface roads adapted to use by motor-driven vehicles are constructed practically parallel to railroads is not only shown by the testimony but is common knowledge."

The problems resulting from the revolution in transportation have been recognized by this Court in the following recent epoch-making decisions:

Continental Baking Co. v. *Woodring*, 286 U. S., 352.

Sproles v. *Binford*, 286 U. S., 374, 394.

Stephenson v. *Binford*, 287 U. S., 251, 271-272.

Bradley v. *Public Utilities Commission*, 289 U. S., 92.

Hicklin v. *Coney*, 290 U. S., 169.

XII.

A general system of discrimination against a citizen may be attacked at any of its component parts. Interstate commerce by railroad is being discriminated against, as well as burdened and crippled, in taxation, regulation, and state requirements placing the cost of all grade crossing protection and separation on railroads alone.

Appellees here, respondents in the trial court, made no effort to dispute the detailed proof offered by appellant as to the burdensome discrimination against the railroad industry in favor of its competitors on the highways by taxation, regulation and otherwise. This discrimination does not all result from any one single statute. It is made up of several, as disclosed by the evidence, and also of lack of regulation of motor traffic. That such a system as a whole may be attacked at any of its vulnerable parts was distinctly held by this Court in *Gregg Dyeing Company* v. *Query*, 286 U. S., 472.

That the Fourteenth Amendment forbids state action of any kind which is unduly discriminatory—whether such action involves taxation, regulation, police power or otherwise—cannot be denied. Typical cases sustaining this now elementary proposition follow:

Southern Railway v. *Virginia*, 290 U. S., 190.
Memphis & Charleston Railway v. *Pace*, 282 U. S., 241, 246.
Ohio Oil Co. v. *Conway*, 281 U. S., 146, 160.
Frost v. *Corporation Commission*, 278 U. S., 515, 521-523.

Louisville Gas & Electric Co. v. *Coleman*, 277 U. S., 32, 37-40.
Interstate Busses Corporation v. *Blodgett*, 276 U. S., 245, 251.
Hopkins v. *Southern California Telephone Co.*, 275 U. S., 393, 403.
Truax v. *Corrigan*, 257 U. S., 312, 331-334, 337-339.

Practically every dollar paid by the motor vehicle industry, including gasoline taxes, goes to the building and maintaining of rights of way for highway users. Their contribution to the cost of government is substantially nothing.

On the other hand, not a dollar of railroad taxes goes to the building of any facilities for them to use. Substantially twenty per cent goes directly to public roads for their competitors to use. The balance goes to the support of government in general. As a result of this legislative monstrosity common carriers on the highways get governmental protection plus a right of way on which to do business for an average of about seven cents out of each dollar of gross revenue—to get the same thing the railroads must spend approximately, on the average, thirty-three cents out of each dollar of gross revenue.

As if this were not enough, railroads alone are forced to build and maintain highway crossings and their approaches, furnish crossing watchmen, crossing gates, wigwags and flashing lights. Competing transportation agencies on the public highways are never asked and never directed by constituted authority to pay a dollar to eliminate the dangers for which they are re-

sponsible—the total cost is placed on the innocent competitor, the railroads.

Truck trains on the highway are never asked to contribute a dollar directly to grade separation projects—that is left alone to the railroads. Competing transportation agencies on the highways thus utilize and profit by the railroads' expenditures in eliminating hazards created by motor vehicles. This is, we think, such arbitrary and unreasonable discrimination as to shock the conscience even of a court of law.

XIII.

The interpretation of the Federal Constitution is not static. It varies with the times to meet new and altered conditions.

There is no dispute in this case but that the use of highways—and the grade crossing problem—has been revolutionized within a few years. Travel thereon is no longer largely social, personal and local. It is primarily commercial, nation-wide in scope, and engaged in the transportation business just as are railroads. The problem here, therefore, is substantially as if a new railroad were crossing an old railroad line. Under all the decisions the new or junior line must pay the cost of the crossing.

When practically every vehicle going over a grade crossing was drawn by an animal (horse, mule or ox) the situation was entirely different from what it is today, when practically all transportation on such federal and state aid highways, as that here involved, is made up of automobiles. Some of the best operating and economic experts in the country testified in detail for

the record—and it is undisputed—how these changed conditions affect the actual train operations and the consequent economic problems.

The record shows, without dispute, the problems incident to the commercial use of motor vehicles which commenced after the great war. Further it is undisputed that trucking really commenced only after 1928. The undisputed record shows that even in the depression the number of trucks and the amount of trucking increased.

Now comes the Interstate Commerce Commission and on July 31, 1933, states that "The competition of other forms of transportation has grown to such formidable proportions that the opinion expressed in 1931 no longer portrays the situation." (195 I. C. C., 5, 70.) If conditions are changing so fast that an analysis of motor vehicle transportation in 1931 is obsolete by July 31, 1933, certainly cases decided many years ago cannot control a case under modern and different conditions.

XIV.

The revolution in transportation and the incidental grade crossing problem necessitates a restatement of the ancient and obsolete rules of law with reference thereto.

Transportation conditions in general and at grade crossings are today nothing like what they were even when the Erie Railroad and Lehigh Valley Railroad cases, pages 42, 43, *supra*, were decided. Interstate commerce by railroad no longer has a monopoly in the transportation field. A mighty and successful competitor has come upon the scene. The very existence of

interstate commerce by railroad is being jeopardized by the burdens placed on it for the benefit of its competitor by motor vehicle. Discrimination against the railroads by taxation, regulation and otherwise is a matter of common knowledge. Congress has done nothing. States have begun to take action sustained by this Court in the recent decisions cited on page 55, *supra*. Tennessee has awakened to the necessities and iniquities of the existing situation and by Chapters 35, 97, 114, and 119 of the 1933 Public Acts of Tennessee has made a beginning towards fair and reasonable treatment of all competing transportation agencies, but it has only made a beginning. With the ever increasing appropriations by public authorities for the construction of an interstate system of highways for the competitors of the railroads to use, the time has come when, if interstate commerce by railroad under private operation is to be preserved, this Court must fill the breach and grant protection pending legislative action consistent with modern conditions.

The use of such roads as the one here involved has changed. These super-roads are neither designed nor constructed for social, personal and local use. The object is to build a right-of-way for great fleets of commercial motor vehicles. There is no difference in essence between transportation on the public highways and transportation on railroad rights-of-way. They are both commercial and highly competitive. The use of crossings by motor vehicles is many hundred times as often as that by railroads. A little time, a little patience, and a little prudence would make impossible any grade crossing accident. But motorists are unwilling—their "murderous contempt for all regulations" is well known. *Southern Railway* v. *Simpson*,

149 Tenn., 458, 462. A negligible proportion of motor accidents are attributable to railroad operations.

On September 21, 1934, the Honorable Joseph B. Eastman, Federal Coordinator of Transportation, in a public address at Cleveland, Ohio, said:

> "The fact is that the automobile has greatly changed both the industry and the art of transportation. The change came so suddenly that it has been hard for the railroads to grasp the situation, but the private and the public carriage of both people and commodities on public highways by motor vehicle is here to stay. It must be reckoned and dealt with as a permanent and beneficial form of transport."

Again Coordinator Eastman on October 22, 1934, in a public address to the American Trucking Association, Inc., in Chicago, said:

> "Certainly no one had a sufficiently wild imagination to dream that by the year A.D. 1934, great trucks would be transporting goods at express speeds and for long distances over beautiful paved highways in every part of the country, whether populous or sparsely settled and whether made up of prairies or mountain ranges. Yet this is the fact. Today the motor truck is an essential and very important part of the national transportation system, and it will so continue."

In October, 1933, Mr. Ted V. Rodgers, president of the American Trucking Association, Inc., in an address at Harrisburg, Pennsylvania, said:

> "It is true that some times trucks incommode the passenger car driver. But the roads were

made primarily for business, and the truck is business. They were not intended primarily as joyways, as some people seem to think."

Again, Major Roy F. Britton, Director, National Highway Users Conference of Washington, at a meeting in Chicago, September, 1933, discussing highway transportation said in part:

"During the past twenty years the transportation of persons and goods by highway has developed to vast proportions and has become a major factor in our economic and social structure."

. . . . . .

"Furthermore, it is absurd to believe that the federal and state governments have expended billions of dollars for improved highways to be used for recreation and pleasure only.

"These highways were built for commerce and commerce includes all forms of transportation, all classes of highway users."

To constitutionally increase existing discrimination by making the Railway alone directly pay one-half the cost of this grade separation project for the benefit of its commercial competitors, engaged in exactly the same sort of business, seems to us impossible in the light of modern transportation conditions.

To undertake to make one form of public carriage pay the cost of an engineering project designed and intended for the commercial convenience of its competitors seems unthinkable.

We are here reminded of what the Tennessee Supreme Court said in *Pope* v. *Phifer*, 50 Tenn., 682, 700, "One of the most prominent features of a state of

slavery is that the labor of one man and its proceeds may be taken and applied for the use of another without his consent."

In conclusion, we quote the famous lines from *Yick Wo* v. *Hopkins*, 118 U. S., 356, 373-4, as follows:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

We respectfully request that the judgment of the Supreme Court of the State of Tennessee be reversed and that the order of the Highway Commissioner of the State of Tennessee and the Tennessee statutes on which it was based be declared invalid on the several grounds set forth in our bill of complaint.

Respectfully submitted,

Fitzgerald Hall

Counsel for appellant.

November 21, 1934.